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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ALLEN L. PHILLIPS, SPECIALIST, UNITED STATES ARMY, *PETITIONER,*

v.

UNITED STATES OF AMERICA, *RESPONDENT.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Specialist Phillips' First Amendment right to the free exercise of his religion was violated by the action of his jailers who denied him access to his religious reading material while Specialist Phillips was confined at the behest of military authorities awaiting trial by court-martial.

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Allen L. Phillips, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Armed Forces entered in this proceeding.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces is reported at 42 M.J. 346 (1995)

(Appendix A). The opinion of the United States Army Court of Military Review [now the United States Army Court of Criminal Appeals] is reported at 38 M.J. 641 (A.C.M.R. 1993) (Appendix B).

JURISDICTION

The judgment of the Court of Appeals for the Armed Forces was entered on September 13, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) (Supp. 1992).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The Constitution of the United States provides in relevant part:

> Amendment I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...."
>
> Amendment VI. "In all criminal prosecutions, the accused shall ... have the Assistance of Counsel for his defence."
>
> Amendment XIV, Section 1, Clause 2. "No State shall ... deny any person within its jurisdiction the equal protection of the laws."

The following provisions of the Uniform Code of Military Justice involved in this case provide in pertinent part:

> Article 13, 10 U.S.C. § 813.

> No person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances required to insure his presence, but he may be subjected to minor punishment during that period for infractions of discipline.

Article 27(a)(1), 10 U.S.C. § 827(a)(1).

> Trial counsel and defense counsel shall be detailed for each general and special court-martial.

Article 38(b)(1), 10 U.S.C. § 838(b)(1).

> The accused has the right to be represented in his defense before a general or special court-martial....

The following provisions of the Manual for Courts-Martial, United States, 1984 [hereinafter Manual for Courts-Martial], are involved in this case:

Rule for Courts-Martial 304.

> (a) *Types of pretrial restraint.* Pretrial restraint is moral or physical restraint on a person's liberty which is imposed before and during disposition of offenses. Pretrial restraint may consist of conditions on liberty, restriction in lieu of arrest, arrest, or confinement.
>
> (f) *Punishment prohibited.* Pretrial restraint is not punishment and shall not be used as such.

> No person who is restrained pending trial may be subjected to punishment or penalty for the offense which is the basis for that restraint. Prisoners being held for trial shall not be required to undergo punitive duty hours or training, perform punitive labor, or wear special uniforms prescribed only for post-trial prisoners. This rule does not prohibit minor punishment during pretrial confinement for infractions of the rules of the place of confinement....

Rule for Courts-Martial 305.

> (j) *Review by military judge.* Once the charges for which the accused has been confined are referred to trial, the military judge shall review the propriety of pretrial confinement upon motion for appropriate relief.
>
> (k) *Remedy.* The remedy for noncompliance with subsection (f), (h), (i), or (j) of this rule shall be an administrative credit against the sentence adjudged for any confinement served as a result of such noncompliance. Such credit shall be computed at the rate of 1 day credit for each day of confinement served as a result of such noncompliance.... For purposes of this subsection, 1 day of confinement shall be equal to 1 day of total forfeiture or a like amount of fine.

Rule for Courts-Martial 502(d)(6).

> *Duties of defense and associate or assistant defense counsel.* Defense counsel shall represent the accused in matters under the code and

> these rules arising from the offenses of which the accused is then suspected or charged....

Rule for Courts-Martial 506(a).

> The accused has the right to be represented before a general or special court-martial by civilian counsel if provided at no expense to the Government, and either by the military counsel detailed under Article 27 or military counsel of the accused's own selection, if reasonably available....

STATEMENT OF THE CASE

On August 27, 1991, Specialist Phillips was arrested by military authorities and ordered to be held in pretrial confinement. Specialist Phillips was placed into pretrial confinement at the Cumberland County Jail in North Carolina at the request of military authorities and pursuant to a contract between the United States and the confinement facility.

Prior to his incarceration, Specialist Phillips was an active member of the Wicca faith.[1] Specialist Phillips was not allowed to practice his religion or possess its literature while he was in pretrial confinement. Specialist Phillips complained to the civilian deputy sheriffs and the military liaison at the Cumberland County Jail about not being allowed access to his religious materials. Specialist Phillips referred to the religious materials as his Wiccan Bible. The

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[1]Wicca is a recognized religion. *United States v. Phillips*, 42 M.J. 346, 349 (1995) (Wiss, J., concurring); *Dettmer v. Landon*, 799 F.2d 929 (4th Cir. 1986), *cert. denied*, 483 U.S. 1007 (1987); Dept. of the Army (DA) Pamphlet 165-13-1, Religious Requirements and Practices of Certain Selected Groups: A Handbook for Chaplains (April 1980).

religious materials are also commonly referred to as the *Book of Shadows.*

When Specialist Phillips' military supervisors, his First Sergeant and Company Commander, visited him at the confinement facility, Specialist Phillips complained about not being allowed access to his religious text. Specialist Phillips also informed his First Sergeant that the jailers would not even allow a friend to give him the religious text. The First Sergeant testified about a conversation with the jailers:

> I remember one time when we were visiting him when he was in Cumberland County, he stated they wouldn't let him have his bible and some kind of religion that I'm not to[o] aware of and Captain—I think it was Captain Johnson, notified—talked to the head jailer there and the woman stated that it wasn't a recognized religious practice in the State of North Carolina and that he was more than welcome to have a bible, but the one that he wanted, they wouldn't allow, no.

United States v. Phillips, 38 M.J. 641, 643 (A.C.M.R. 1993).

On October 16, 1991, January 30 and April 6, 1992, Specialist Phillips was tried before a military judge sitting as a general court-martial at Fort Bragg, North Carolina. Pursuant to his pleas, he was convicted of absence without leave, conspiracy to wrongfully distribute cocaine, and wrongful possession and distribution of cocaine, in violation of Articles 86, 81, and 112a, Uniform Code of Military Justice [hereinafter referred to as U.C.M.J.], 10 U.S.C. §§ 886, 881, and 912a (1988), respectively. The court sentenced Specialist Phillips to a bad-conduct discharge, confinement for twenty months, forfeiture of all pay and allowances, and reduction to Private E1. The convening authority approved the sentence as adjudged.

On November 10, 1993, the Army Court of Military Review [now the Army Court of Criminal Appeals][2] affirmed the findings and the sentence. *United States v. Phillips,* 38 M.J. 641 (A.C.M.R. 1993)(Appendix B).

Specialist Phillips then sought review by the United States Court of Military Appeals [now the United States Court of Appeals for the Armed Forces] pursuant to Article 67, U.C.M.J., 10 U.S.C. § 867. The Court of Appeals rendered its opinion on September 13, 1995, and affirmed the Army Court. *United States v. Phillips,* 42 M.J. 346 (1995) (Appendix A). Both the Army Court and the Court of Appeals for the Armed Forces premised their opinions on the conclusion that Specialist Phillips' constitutional right to practice his religion was not violated,[3] *i.e.,* the restrictions upon Specialist Phillips' free exercise were legitimate.

REASONS FOR GRANTING THE WRIT

"Religious freedom is one of the cornerstones of our American heritage. No one should be denied this right; not

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[2]The National Defense Authorization Act for Fiscal Year 1995, Pub. L. 103-337, § 924, 108 Stat. 2831, changed the nomenclature for the military appellate courts. The previous "Court[s] of Military Review" were rechristened as the "Court[s] of Criminal Appeals" and the "United States Court of Military Appeals" was renamed the "United States Court of Appeals for the Armed Forces." *Ryder v. United States,* No. 94-431, U.S. Sup. Ct., June 12, 1995, at n. 2, 1995 WL 347378 (U.S.).

[3]The issue before both of the military courts was framed as an ineffective assistance of counsel issue alleging that the trial defense counsel failed to provide any evidence to the trial judge regarding whether Wicca was a religion. The Court of Appeals for the Armed Forces erred in holding that the trial defense attorneys were not ineffective when they failed to provide information relating to the Wicca faith requested by the trial judge, even though the attorneys' inaction arguably resulted in the loss of Specialist Phillips' request for sentencing credit based on the violation of his constitutional right. *See United States v. Phillips,* 42 M.J. 346, 353-354 (1995) (Sullivan, C.J., dissenting).

even a non-Christian soldier sitting in a jail awaiting trial." *United States v. Phillips,* 42 M.J. 346, 353-354 (1995) (Sullivan, C.J., dissenting).

The Court of Appeals for the Armed Forces failed to protect Specialist Phillips' freedom to exercise his religion guaranteed by the First and Fourteenth Amendments. This failure raises a substantial federal question, and the military court opinions conflict with decisions of this Court and the decisions of at least two federal Circuit Courts of Appeal. *See Bell v. Wolfish,* 441 U.S. 520 (1978); *Cruz v. Beto,* 405 U.S. 319 (1971); *Johnson-Bey v. Lane,* 863 F.2d 1308 (7th Cir. 1988); *Dettmer v. Landon,* 799 F.2d 929 (4th Cir. 1986), *cert. denied,* 483 U.S. 1007 (1987). Without review by this Court, members of the armed forces held in pretrial confinement shall remain subject to unconstitutional restrictions upon their right to freely exercise their religious beliefs.

The government may not subject pretrial detainees to conditions that violate the constitution. *Bell v. Wolfish,* 441 U.S. at 536-537. Conditions that abridge a pretrial detainee's right to exercise his or her religion violate the first and fourteenth amendments to the Constitution. *Id.* at 545; *Cruz,* 405 U.S. 319 (1972). The right of a pretrial detainee to exercise his religion is subject only to legitimate restrictions. *Bell,* 441 U.S. at 545. Restrictions are legitimate if they amount to a "mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application." *Id.* at 546 (citing *Wolff v. McDonnell,* 418 U.S. 539, 556 (1974)). Limits on the exercise of such a right may be required in the interests of institutional security and preservation of internal order and discipline. *Bell,* 441 U.S. at 546. Refusal to provide access to religious material merely because it is not Christian is an illegitimate restriction. *See Cruz,* 405 U.S. 319 (1972); *see also Turner v. Safley,* 482 U.S. 78, 90 (1986) (a government restriction must be legitimate and neutral).

When Specialist Phillips asked for his religious documents relating to his chosen religion, the Wicca faith, while he was in pretrial confinement, the jailer, functioning in furtherance of an agreement with the military, told him he could not have his religious papers, but he could have the Christian Bible instead. There is no dispute in this case that all Specialist Phillips requested to practice his religion was what he referred to as his "Wiccan Bible." *Phillips*, 42 M.J. at 347. The trial judge found that Specialist Phillips was denied access to materials concerning the Wiccan religion. *Id.* at 348. The Court of Appeals for the Armed Forces erroneously indicated its concern about other implements and devices allegedly necessary to practice the Wiccan religion. Specialist Phillips request was reasonable, however, because there was no request in this case for anything other than religious reading material. *See Dettmer v. Landon*, 799 F.2d 929 (4th Cir. 1986) (holding that the Wiccan religion is entitled to First Amendment protections and allowing a prisoner to have some, but not all, physical items to practice his religion).

The Court of Appeals for the Armed Forces' decision that Specialist Phillips did not suffer any actionable prejudice by being denied his religious reading material conflicts with decisions of this Court and must be reversed. In addressing prison regulations, this Court held:

> [S]everal factors are relevant in determining the reasonableness of the regulation at issue. First, there must be a "valid, rational connection" between the prison regulation and the legitimate governmental interest put forward to justify it. Thus, a regulation cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational. Moreover, the governmental objective must be a legitimate and neutral one.

> We have found it important to inquire whether prison regulations restricting inmate's First Amendment rights operated in a neutral fashion, without regard to the content of the expression.

Turner v. Safley, 482 U.S. 78, 89-90 (1986) (citations omitted). In this case, where inmates or detainees could have the Christian Bible but not the Wiccan Bible, there can be no legitimate or neutral government objective. Religious content served as the sole determining criteria.

This Court has held "that sentenced prisoners enjoy freedom of speech and religion under the First and Fourteenth Amendments.... *A fortori,* pretrial detainees, who have not been convicted of any crimes, retain at least those constitutional rights that we have held are enjoyed by convicted prisoners." *Bell v. Wolfish,* 441 U.S. 520, 545 (1978) (citation omitted). Although pretrial confinees may be subjected to some restrictions and conditions of the confinement facility, the government may not subject a pretrial confinee to conditions and restrictions which amount to punishment or "otherwise violate the Constitution." *Id.* at 536-537. The conduct which occurred in the instant case was a clear violation of Specialist Phillips' right to enjoy freedom of religion.

The Court of Appeals for the Armed Forces' decision conflicts with this Court's holding in *Cruz v. Beto,* 405 U.S. 319, 322 (1971). In *Cruz,* a Buddhist inmate complained that he was not allowed to use a chapel or correspond with his religious advisor, and was punished for sharing his religious materials with other inmates, even though other inmates were allowed to pursue Christianity without such prohibitions. *Id.* at 319-320. This Court noted the following:

> If Cruz was a Buddhist and if he was denied a reasonable opportunity of pursuing his faith

> comparable to the opportunity afforded fellow prisoners who adhere to conventional religious precepts, then there was palpable discrimination by the State against the Buddhist religion, established 600 B.C., long before the Christian era. The First Amendment ... prohibits government from making a law "prohibiting the free exercise" of religion.

Id. at 322.

Similarly, in *Johnson-Bey v. Lane, supra,* the Seventh Circuit Court of Appeals noted that "[t]he treatment of prison inmates and the treatment of religious heterodoxy are important indices of civilization...." 863 F.2d at 1312. That court held that a "prison may not, because it is contemptuous or unreasoningly fearful of a particular sect, place arbitrary obstacles in the way of inmates seeking to participate in the sect's modes of observance." *Id.* at 1311 (citing *Cruz,* 405 U.S. at 322).

In this light, the decision of the Court of Appeals for the Armed Forces runs perilously close to an improper sanction of Christianity to the exclusion of other religions in violation of the establishment clause of the First Amendment. *Gillette v. United States,* 401 U.S. 437, 448-450 (1970).

Accordingly, a grant of the petition for writ of certiorari is warranted for the following reasons: (1) to address the substantial federal question raised by the denial of Specialist Phillips' right to the free exercise of his religion, the discrimination between Christian and non-Christian pretrial detainees, and the government's advancement of Christianity over any other recognized religion; (2) to resolve conflicts between the decision of the Court of Appeals for the Armed Forces and the opinions of this Court and subordinate federal appellate courts; and (3) to

exercise this Court's supervisory powers over the military courts. Failure to review the Court of Appeals' decision leaves countless pretrial detainees without any recourse for a violation of their constitutional rights.

CONCLUSION

The decision of the Court of Appeals effectively deprived Specialist Phillips of his Constitutional right to the free exercise of his religion. The Court of Appeals' holding has nationwide and even worldwide implications. There are members of the Armed Forces in pretrial confinement at facilities all around the world and their right to the free exercise of their chosen religion has been impaired. The Court of Appeals' decision adversely affects the first amendment rights of other federal pretrial detainees and confinees as well.

An intentional deprivation by an agent of the military of a citizen's right to exercise his religion, whether in pretrial confinement or not, must be actionable regardless of whether the federal agent's action was "intended" to be punishment for indeed it does punish. The shocking offer by the officer for Specialist Phillips to use the Christian Bible instead of religious papers relating to Specialist Phillips' chosen religion implicates equal protection and separation of church and state issues.

For the foregoing reasons, this Court should grant review of the decision of the United States Court of Appeals for the Armed Forces.

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